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### A Reasonable Belief: In Support of LGBT Plaintiffs' Title VII Retaliation Claims

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# A REASONABLE BELIEF: IN SUPPORT OF LGBT PLAINTIFFS' TITLE VII RETALIATION CLAIMS

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## ABSTRACT

When an LGBT employee is punished for complaining about discrimination in the workplace, he or she has two potential causes of action under Title VII: first, a challenge to the underlying discrimination, and second, a challenge to the resulting retaliation. The first claim is vulnerable to dismissal under courts' narrow interpretation of Title VII's prohibition of discrimination "because of sex" as applied to LGBT plaintiffs. But such an outcome need not determine the fate of the second claim. Faithful application of retaliation law's "reasonable belief" standard, which protects a plaintiff from reprisal so long as she reasonably believed that she was complaining about unlawful discrimination, should allow LGBT plaintiffs to successfully challenge the reprisal, even if the court determines that the underlying discrimination was not "because of sex." This Article provides several arguments in support of such reasonable belief, in order to strengthen both the law's protection from retaliation in general as well as the challenges of obtaining relief for workplace discrimination against LGBT individuals.

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## INTRODUCTION

Despite the prevalence of discrimination against lesbian, gay, bisexual, and transgender (LGBT) employees in the workplace,<sup>1</sup> Title VII does not expressly prohibit employment discrimination on the basis of sexual orientation or transgender status. For this reason, until such time as Congress changes the law, an LGBT employee who suffers discrimination on the job must formulate his or her claim as one of sex discrimination in order to gain relief under federal law. Fortunately, this has been possible in many cases. Courts have found Title VII's prohibition against sex discrimination to apply where plaintiffs were targeted for their gender nonconformity<sup>2</sup> or change of sex,<sup>3</sup> and where the plaintiff was harassed in a sexual manner.<sup>4</sup> At the same time, LGBT plaintiffs frequently run up against the limits of these approaches, such as when courts narrowly interpret the plaintiff's evidence of gender nonconformity<sup>5</sup> or adhere to restrictive precedents that foreclose expansive definitions of sex discrimination.<sup>6</sup> As such, sex discrimination claims are a second-best solution for LGBT plaintiffs—an insufficient work-around to the problem created by Title VII's omission of sexual orientation and gender identity as protected characteristics.

With a toolbox limited to second-best solutions, it is useful to have as many as possible from which to choose. To that end, this Article seeks to make a modest contribution to the toolbox by generating support for

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1. Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 719 (2012).

2. EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 472 (5th Cir. 2013) (en banc); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 292 (3d Cir. 2009); Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874 (9th Cir. 2001); Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999).

3. Schroer v. Billington, 424 F. Supp. 2d 203, 210–11 (D.D.C. 2006).

4. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1065 (9th Cir. 2002); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1217 (D. Or. 2002).

5. E.g., Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 764 (6th Cir. 2006) (rejecting gay plaintiff's sex discrimination claim because he "failed to allege that he did not conform to traditional gender stereotypes in any observable way at work").

6. E.g., Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007).

another work-around: retaliation claims. Many times, particularly in harassment cases, an LGBT employee who suffers discrimination on the job also endures reprisals for having reported it. These reprisals ought to qualify for protection under Title VII's anti-retaliation provision, even in cases where the underlying discrimination does not appear to the court to be an instance of actionable sex discrimination. With few exceptions,<sup>7</sup> however, courts often summarily dismiss attendant retaliation claims with no further analysis other than to note that the underlying discrimination was not itself a violation of law.<sup>8</sup> This approach flies in the face of Supreme Court precedent, which has interpreted Title VII's anti-retaliation provision to potentially apply in cases where the plaintiff reasonably believes that the complained-of discrimination violates the statute.<sup>9</sup>

There are many reasons why LGBT employees could reasonably believe that discrimination about which they complain violates Title VII. First, though an erroneous belief, it is widely assumed that a federal ban on sexual orientation discrimination already exists.<sup>10</sup> This collective assumption likely derives from an increasing number of state-level protections against discrimination and the well-known political and legislative victories in the marriage-equality movement. Second, even if a court rejects that it is reasonable to believe that federal law prohibits discrimination on the basis of sexual orientation, that court should still be willing to consider that an LGBT employee reasonably believed that the complained-of discrimination was actionable sex discrimination. The reasonableness of this belief is underscored by the fact that federal courts no longer categorically deny sex discrimination claims by LGBT plaintiffs. Most circuit courts of appeal have either decided sex discrimination claims in favor of an LGBT plaintiff,<sup>11</sup> or at least addressed the possibil-

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7. *E.g.*, *Dawson v. Entek Int'l*, 630 F.3d 928, 936–37 (9th Cir. 2011); *McCarthy v. R.J. Reynolds Tobacco Co.*, No. CIV. 2:09–2495 WBS DAD, 2011 WL 4006634, at \*4 (E.D. Cal. Sept. 8, 2011). In *McCarthy* the court stated:

There cannot be any doubt that the plaintiffs in this case were reasonable in believing that Title VII prohibited defendant from terminating their coworker based on his sexual orientation. Not only has there been a growing gay rights movement in this country, the courts have also recognized sexual orientation as a status that merits heightened protection.

*McCarthy*, 2011 WL 4006634, at \*4 (citation omitted).

8. *E.g.*, *Larson v. United Air Lines*, 482 F. App'x 344, 351 (10th Cir. 2012); *Gilbert v. Country Music Ass'n*, 432 F. App'x 516, 520 (6th Cir. 2011); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1060 (7th Cir. 2003); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000).

9. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001).

10. A survey by the Center for American Progress found that “9 of out [sic] 10 voters erroneously think that a federal law is already in place protecting gay and transgender people from workplace discrimination.” Jeff Krehely, *Polls Show Huge Public Support for Gay and Transgender Workplace Protections*, CENTER FOR AM. PROGRESS, June 2, 2011, <http://www.americanprogress.org/issues/lgbt/news/2011/06/02/9716/polls-show-huge-public-support-for-gay-and-transgender-workplace-protections/>.

11. *E.g.*, *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 457 (5th Cir. 2013) (en banc); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 293 (3d Cir. 2009); *Smith v. City of Salem*, 378 F.3d 566,

ity of doing so in cases where the plaintiff properly alleged and supported a claim based on gender nonconformity.<sup>12</sup> Moreover, interpretations of Title VII—whether by the courts or, most recently, the Equal Employment Opportunity Commission (EEOC)<sup>13</sup>—are increasingly recognizing the inextricable convergence of sex, sexual orientation, and gender identity.<sup>14</sup> Even if the judge in a plaintiff's case does not think, for example, that “faggot” is a gender-based slur,<sup>15</sup> it is hardly unreasonable for the plaintiff to believe that it is. In laying out support for an LGBT plaintiff's reasonable belief in the illegality of the underlying discrimination, this Article hopes to strengthen the potential for retaliation claims to be successful in general, and in particular for those plaintiffs who would otherwise be without recourse under Title VII.

Part I of this Article will first explain briefly why, despite courts' expanding interpretations of sex discrimination, Title VII's prohibition on sex discrimination remains a limited remedy for workplace discrimination against LGBT employees. Part II examines Title VII's anti-retaliation provision and the reasonable belief doctrine and provides examples of retaliation cases predicated on anti-LGBT discrimination. Finally, Part III provides support for LGBT plaintiffs' reasonable belief that underlying discrimination is unlawful.

## I. SEX DISCRIMINATION CLAIMS AS SECOND-BEST SOLUTIONS FOR LGBT PLAINTIFFS

Notwithstanding their vulnerability to bias and harassment on the job, Title VII only offers limited protection to LGBT employees. As this Part will describe, early judicial interpretations of Title VII foreclosed interpretations that would have extended the statute's prohibition on sex discrimination to also include discrimination based on homosexuality or transgender status per se. The Supreme Court's 1989 ruling in *Price Waterhouse v. Hopkins*<sup>16</sup> has provided relief to some LGBT plaintiffs, but only in cases where discrimination based on gender nonconformity, read narrowly, is also present. Notwithstanding the more robust view of sex discrimination that is emerging from the EEOC, the courts generally

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578 (6th Cir. 2004); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 877–78 (9th Cir. 2001); *Schmedding v. Tnemec Co.*, 187 F.3d 862, 865 (8th Cir. 1999).

12. *E.g.*, *Dawson v. Bumble & Bumble*, 398 F.3d 211, 224 (2d Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 265 (1st Cir. 1999).

13. *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

14. *Henderson v. Labor Finders of Va., Inc.*, No. 3:12cv600, 2013 WL 1352158, at \*4 (E.D. Va. Apr. 2, 2013) (“Stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.” (quoting *Howell v. N. Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004)) (internal quotation mark omitted)); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (“Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms.”).

15. *E.g.*, *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1060, 1067–68 (7th Cir. 2003).

16. 490 U.S. 228 (1989) (plurality opinion).

have yet to embrace this view. Title VII's ban on sex discrimination thus remains a second-best solution to employers' discrimination against LGBT employees.

#### *A. Early Courts Foreclose Broad Interpretations of Sex Discrimination*

Title VII of the Civil Rights Act of 1964, the federal employment discrimination statute, prohibits an employer from refusing to hire, firing, or otherwise discriminating against any individual "because of such individual's race, color, religion, sex, or national origin."<sup>17</sup> It does not expressly enumerate sexual orientation or gender identity as protected characteristics, and some early judicial decisions under Title VII interpreted this omission to exclude LGBT plaintiffs from the protections of the statute. For example, in 1979, the Ninth Circuit Court of Appeals, deciding *DeSantis v. Pacific Telegraph & Telephone Co.*,<sup>18</sup> rejected several arguments that sought to position sexual orientation discrimination as a subset of sex discrimination, including the argument that discrimination against a male employee who chooses male sexual partners is sex discrimination in that it treats him differently from a female employee who also chooses a male sexual partner, as well as the argument that sexual orientation discrimination relies on stereotypes about hegemonic masculinity.<sup>19</sup> The court reasoned that any argument that renders all sexual orientation discrimination to fall within the ambit of sex discrimination would have constituted impermissible "bootstrap[ing]" by defying Congress's intentional exclusion of sexual orientation as a protected characteristic under Title VII.<sup>20</sup> Five years later, the Seventh Circuit's decision in *Ulane v. Eastern Airlines*<sup>21</sup> created a similar categorical exclusion for transgender plaintiffs. In that case, the court dismissed a case against an airline that fired a pilot after discovering that she had had sex reassignment surgery. The court rejected Ulane's argument that the discrimination she endured was "because of . . . sex," either as discrimination against Ulane because of her female sex or because of her change of sex.<sup>22</sup> Both arguments would have required the court to interpret sex to mean something other than biological sex—an interpretation the court believed was foreclosed by congressional intent.

#### *B. Price Waterhouse Offers Some Relief to LGBT Plaintiffs*

The Supreme Court's later decision in *Price Waterhouse v. Hopkins* rejected a narrow reading of sex discrimination and provided new ammunition for LGBT plaintiffs to challenge discrimination in the workplace. In that case, the plaintiff, Ann Hopkins, had been passed over for

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17. 42 U.S.C. § 2000e-2(a)(2) (2012).

18. 608 F.2d 327 (9th Cir. 1979).

19. *Id.* at 330.

20. *Id.* (internal quotation marks omitted).

21. 742 F.2d 1081 (7th Cir. 1984).

22. *Id.* at 1084, 1087.

promotion in her accounting firm because the partners thought she was too aggressive for a woman.<sup>23</sup> The Court viewed this as impermissible sex discrimination because the employer's practice of rewarding aggressiveness in men while objecting to aggressive women placed Hopkins in an "intolerable and impermissible catch 22."<sup>24</sup> With this conclusion, the Court suggested an expanded definition of sex that includes not just whether someone is male or female, but also how one presents one's gender.<sup>25</sup>

Lower courts have come to read *Price Waterhouse* for the proposition that Title VII prohibits employers from discriminating against employees who do not conform to stereotyped notions of masculinity and femininity. In *Nichols v. Azteca Restaurant Enterprises*,<sup>26</sup> the Ninth Circuit recognized that its earlier holding in *DeSantis* was at least partially abrogated by *Price Waterhouse* when it held an employer liable for harassment that targeted a male employee because of his gender nonconformity.<sup>27</sup> Though the plaintiff in that case was not identified as gay, the nature of the harassment he endured suggested that his co-workers perceived him to be so; they called him "she" and other "vulgar name[s] . . . cast in female terms[.]" taunted him for effeminate mannerisms, and teased him for not sleeping with a female co-worker.<sup>28</sup> Like the Ninth Circuit, most courts have similarly held that Title VII prohibits anti-gay harassment that demonstrably targets the plaintiff's gender nonconformity.<sup>29</sup>

*Price Waterhouse* also created a potential Title VII remedy for transgender employees who endure discrimination on the job. In *Smith v. City of Salem*,<sup>30</sup> for example, the Sixth Circuit Court of Appeals agreed that an employer's adverse treatment of a transgender employee who had begun to express his female gender identity on the job was prohibited by Title VII because it targeted the plaintiff for failing to conform to stereotypes consonant with the sex (male) they perceived the plaintiff to be.<sup>31</sup> In so holding, the court acknowledged that earlier precedent such as

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23. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (plurality opinion).

24. *Id.* at 251.

25. *Id.*

26. 256 F.3d 864 (9th Cir. 2001).

27. *Id.* at 874–75.

28. *Id.* at 874 (internal quotation marks omitted).

29. *E.g.*, *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 449 (5th Cir. 2013) (en banc); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 293 (3d Cir. 2009); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261–62 (1st Cir. 1999); *Schmedding v. Tnemec Co.*, 187 F.3d 862, 865 (8th Cir. 1999); *Doe ex rel. Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).

30. 378 F.3d 566 (6th Cir. 2004).

31. *Id.* at 574–75.

*Ulane* had been eviscerated by the Court's decision in *Price Waterhouse*.<sup>32</sup> Other courts have ruled similarly.<sup>33</sup>

### *C. Narrow Interpretations of Price Waterhouse Foreclose Relief to Many LGBT Plaintiffs*

Despite broadening the scope of actionable sex discrimination, the sex-stereotyping argument created by *Price Waterhouse* offers only limited protection to LGBT plaintiffs. Most significantly for gay and lesbian plaintiffs, courts apply *Price Waterhouse* only to gender-nonconforming behavior or appearance that is visible on the job.<sup>34</sup> A remnant of the anti-bootstrapping rationale, this limitation precludes gay and lesbian plaintiffs from arguing that homosexuality per se is a departure from sex stereotypes that is protected from discrimination.<sup>35</sup> This limitation ensures that only gay and lesbian plaintiffs who are visibly gender-nonconforming—a gay male with effeminate mannerisms, or a lesbian with masculine ones—can potentially allege an actionable claim of sex discrimination.

Gay and lesbian plaintiffs also have difficulty proving that the discrimination they experienced was based on sex. Some courts view anti-gay bias as an alternative to gender-based motivation for harassment, and do not see them as overlapping or related. In these courts, evidence of anti-gay animus—plaintiff was called a faggot, for example—reflects a singular homophobic motive for harassment that forecloses the possibility that the plaintiff's gender was also a target.<sup>36</sup> With few exceptions,<sup>37</sup>

32. *Id.* at 573.

33. *Barnes v. City of Cincinnati*, 401 F.3d 729, 741 (6th Cir. 2005); *Lopez v. River Oaks Imaging & Diagnostic Grp.*, 542 F. Supp. 2d 653, 656 (S.D. Tex. 2008) (examining action brought by transsexual male-to-female (MTF) plaintiff whose job offer was revoked after she came to the interview presenting as a woman); *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174, at \*4 (N.D. Ohio Nov. 9, 2001); see also *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011) (holding that discrimination against a transgender plaintiff is sex discrimination for purposes of applying heightened scrutiny under the Equal Protection Clause, noting that “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes”).

34. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006) (rejecting plaintiff's argument that “his supposed sexual practices, [where] he behaved more like a woman” could qualify as actionable sex-stereotyping under *Price Waterhouse*); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (finding plaintiff's evidence was insufficient to show that she was discriminated against for her gender nonconforming appearance, rather than her sexual orientation).

35. *Dawson*, 398 F.3d at 218. The court stated:

When utilized by an avowedly homosexual plaintiff, . . . gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that “[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.” Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to “bootstrap protection for sexual orientation into Title VII.”

*Id.* (citation omitted) (quoting *Howell v. N. Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000)).

36. *Kay v. Independence Blue Cross*, 142 F. App'x 48, 50–51 (3d Cir. 2005) (interpreting plaintiff's harassment as being related to his sexual orientation rather than gender, where plaintiff was called a “faggot” and other slurs, but was also told “[a] real man in the corporate world would



courts have generally not embraced the view that anti-gay harassment is the means by which some workplace environments police gender norms.<sup>38</sup>

The limits of *Price Waterhouse* are made more significant when viewed in the context of courts' reluctance, since *Oncale v. Sundowner Offshore Services, Inc.*,<sup>39</sup> to find that the sexual nature of harassment satisfies the requirement that harassment be motivated by the victim's sex. In *Oncale*, the Court rejected the idea that same-sex harassment was categorically excluded from protection under Title VII, in contradiction to some lower courts that had so held.<sup>40</sup> However, the Court went on to emphasize that a plaintiff still needs to demonstrate that harassment was motivated by sex, such as by offering evidence that (1) the harasser is homosexual, and therefore motivated by sexual desire; (2) the harasser is generally hostile to the presence of the plaintiff's sex in the workplace; or (3) the harasser in a mixed-sex workplace singles out one sex for harassing treatment.<sup>41</sup> Notably, the Court did not suggest that the highly sexualized nature of harassment could also satisfy this burden; if it had, the Court would not have had to remand *Oncale*'s case on this question, since his allegations—that co-workers restrained him while one placed his penis on *Oncale*'s neck and arm, that they threatened to rape him, and that they forcibly pushed a bar of soap into his anus while he was show-

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not come to work with an earring in his ear. But I guess you will never be a 'real man'!!!!!!" (internal quotation marks omitted)); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (holding that plaintiff repeatedly called "faggot" and other gay slurs did not allege gender nonconformity claim under *Price Waterhouse*); see *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1086 (7th Cir. 2000); *EEOC v. Family Dollar Stores, Inc.*, No. 1:06-CV-2569-TWT, 2008 WL 4098723, at \*17 (N.D. Ga. Aug. 28, 2008); *Mowery v. Escambia Cnty. Utils. Auth.*, No. 3:04CV382-RS-EMT, 2006 WL 327965, at \*7 (N.D. Fla. 2006) ("Being forty years old, owning a home and truck, living alone, and not discussing one's sexual partners are not feminine gender traits. These characteristics may reflect stereotypes associated with a homosexual lifestyle, but they are not stereotypes associated with a feminine gender."); see also Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287, 312, 314 (2011) (criticizing this approach and arguing that unprotected traits like sexual orientation should be neutral for purposes of a sex discrimination claim).

37. *E.g.*, *Henderson v. Labor Finders of Va., Inc.*, No. 3:12cv600, 2013 WL 1352158, at \*1–2, \*7 (E.D. Va. Apr. 2, 2013); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.").

38. Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 633 (1992) ("Homophobia is both a symptom and a primary weapon of gender discrimination; any serious attempt to attain gender equality must aim to remove it."); Kramer, *supra* note 36, at 313; Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1776–77 (1998); Richard F. Storrow, *Gender Typing in Stereo: The Transgender Dilemma in Employment Discrimination*, 55 ME. L. REV. 118, 142 (2002).

39. 523 U.S. 75 (1998).

40. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451–52 (5th Cir. 1994), *abrogated by Oncale*, 523 U.S. at 75, 77; see also Richard F. Storrow, *Same-Sex Sexual Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 692–93 (1998) (describing the legal landscape for same-sex harassment prior to *Oncale*).

41. See *Oncale*, 523 U.S. at 80–81.

ering—clearly would have qualified.<sup>42</sup> With one notable exception,<sup>43</sup> the courts have generally been reluctant to conclude after *Oncale* that the sexualized nature of harassing conduct can support a claim that same-sex harassment is motivated by the victim's sex—an unfortunate limitation for gay employees who are particularly vulnerable to same-sex harassment. For example, in *Vickers v. Fairfield Medical Center*,<sup>44</sup> the Sixth Circuit Court of Appeals denied that the plaintiff, a gay man, had endured harassment because of sex where the harassment, while sexual in nature, did not reflect the harasser's sexual desire, general hostility towards men, or differential treatment towards men.<sup>45</sup> While courts generally do allow gay plaintiffs to use gender nonconformity as the basis for arguing that harassment targets them because of sex, cases like *Vickers* show that the limitations of this doctrine often leave gay plaintiffs without any remedy at all.<sup>46</sup>

*Price Waterhouse* is also a limited remedy for discrimination against transgender employees in that courts may potentially apply it only to situations like in *Smith*, where the employee begins to transition on the job and is targeted for discrimination for dressing or behaving in ways that belie the employee's natal sex. As with homosexuality, most courts are unwilling to consider being transgender per se as gender nonconformity. While many cases of discrimination against a transgender employee will also involve discrimination for failing to appear and behave in accordance with natal sex stereotypes, and thus be actionable, some cases will fall outside of this zone of overlap. Discrimination that targets a transgender employee whose transgender identity is discovered (or disclosed) but who does not (or not yet) appear as their affirmed sex at work may not be prohibited under *Price Waterhouse*.<sup>47</sup> And even in

42. *Id.* at 82; *Oncale*, 83 F.3d. at 118–19.

43. *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1066–68 (9th Cir. 2002) (en banc) (concluding that plaintiff's allegations of "physical conduct of a sexual nature" state a cause of action for sexual harassment under Title VII (internal quotation marks omitted)); see also Edward J. Reeves & Lainie D. Decker, *Before ENDA: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law*, 20 L. & SEXUALITY 61, 68 (2011) (pointing out the unique nature of the *Rene* decision).

44. 453 F.3d 757 (6th Cir. 2006).

45. *Id.* at 765.

46. *Id.* at 763; *McCown v. St. John's Health Sys., Inc.*, 349 F.3d 540, 543 (8th Cir. 2003); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001); *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 261–62 (4th Cir. 2001); see also Reeves & Decker, *supra* note 43, at 68–69; Kavita B. Ramakrishnan, *Inconsistent Legal Treatment of Unwanted Sexual Advances: A Study of the Homosexual Advance Defense, Street Harassment, and Sexual Harassment in the Workplace*, 26 BERKELEY J. GENDER L. & JUST. 291, 337–39 (2011) (pointing out that heterosexual men have an easier time prevailing on same-sex harassment claims than queer men).

47. *Schroer v. Billington*, 424 F. Supp. 2d 203, 211 (D.D.C. 2006). The court stated:

A transsexual plaintiff might successfully state a *Price Waterhouse*-type claim if the claim is that he or she has been discriminated against because of a failure to act or appear masculine or feminine enough for an employer . . . but such a claim must actually arise from the employee's appearance or conduct and the employer's stereotypical perceptions. Such a claim is not stated here, where the complaint alleges that Schroer's non-selection was the direct result of her disclosure of her gender dysphoria and of her intention to

cases where a transgender employee is dressing or behaving in a manner that belies stereotypes of his or her natal sex, courts may not agree that this was the employer's motivation for discrimination.<sup>48</sup> For instance, the plaintiff in *Etsitty v. Utah Transit Authority*<sup>49</sup> was a transgender bus driver who, while on the job, had begun the process of transitioning from male to female.<sup>50</sup> She sued the transit authority, which fired her when she did not agree to refrain from using women's bathrooms along her route.<sup>51</sup> On appeal, the Tenth Circuit Court of Appeals rejected her argument that using a women's bathroom on the job was gender nonconforming behavior that was protected from discrimination under *Price Waterhouse*.<sup>52</sup> As such, the employer could rely on its concern about bathroom usage as a legitimate, nondiscriminatory reason in satisfaction of its burden under *McDonnell Douglas Corp. v. Green*.<sup>53</sup>

Even in cases where the gender nonconformity theory could potentially apply, it is not always the plaintiff's desired approach, since it can be undermining to a transgender plaintiff's gender identity to have to seek relief as a nonconforming member of their natal, rather than affirmed, sex.<sup>54</sup> It also validates gender stereotypes as such, since describ-

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begin presenting herself as a woman, or her display of photographs of herself in feminine attire, or both.

*Id.* (citation omitted). The court went on to deny the employer's motion to dismiss anyway, and later concluded after trial that the plaintiff had presented evidence of discrimination based on gender nonconformity. *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008); *see also* *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at \*2 (E.D. La. 2002) (employer terminated transgender employee after learning the employee identified as transgender and cross-dressed outside of work); Jason Lee, Note, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423, 441 (2012).

48. Mary Kristen Kelly, Note, *(Trans)forming Traditional Interpretations of Title VII: "Because of Sex" and the Transgender Dilemma*, 17 DUKE J. GENDER L. & POL'Y 219, 230 (2010) (citing *Myers v. Cuyahoga Cnty.*, 182 Fed. App'x 510, 520 (6th Cir. 2006)) (describing a case in which a transgender plaintiff's harassment claim was dismissed "because the only evidence she was able to show was that her supervisor referred to her as a 'he/she,' which," while offensive, did not constitute evidence of the harasser's animus towards her gender nonconformity).

49. 502 F.3d 1215 (10th Cir. 2007).

50. *Id.* at 1218-19.

51. *Id.* at 1219.

52. *Id.* at 1224.

53. *Id.* *McDonnell Douglas* allows a plaintiff to satisfy the requirement of proving discriminatory intent based on circumstantial, rather than direct, evidence of such motive. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 807 (1973). A plaintiff who satisfies the elements of a prima facie case shifts the burden to the defendant to demonstrate a nondiscriminatory reason for adverse employment action, which the plaintiff may rebut with evidence that the nondiscriminatory reason is pretext for discrimination. *Id.* In *Etsitty*, the court assumed without deciding that the plaintiff had met her burden to satisfy the prima facie case. 502 F.3d at 1224. After accepting the transit authority's rationale as legitimate and nondiscriminatory, the court then determined that *Etsitty* had not proffered evidence sufficient to show that the bathroom usage rationale was pretext for discrimination based on sex/gender nonconformity. *Id.* at 1227.

54. Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651, 666 (2009) ("Our difficulty with the *Smith* case is that the court reduces *Smith's* transgender identity to little more than a fashion choice to wear women's clothing."); Kelly, *supra* note 48, at 230; Sharon M. McGowan, *Working with Clients to Develop Compatible Visions of What It Means to "Win" a Case: Reflections on Schroer v. Billington*, 45 HARV. C.R.-C.L. L. REV. 205, 205 (2010) (quoting Diane Schroer as saying, "I haven't gone through all this only to have a

ing a person's behavior or appearance as gender nonconforming implies there is a "correct" gender for whatever behavior or appearance is at issue.<sup>55</sup> This might not feel right to some transgender plaintiffs, particularly if their gender identity is outside the gender binary altogether.

#### *D. Emerging Alternatives to Price Waterhouse*

Because of these limitations, it is promising that alternative interpretations of Title VII's application to transgender plaintiffs have begun to emerge. In 2008, a district court judge in Washington, D.C. interpreted the statute's ban on sex discrimination to include discrimination on the basis of one's transsexuality. In that case, *Schroer v. Billington*,<sup>56</sup> the Library of Congress revoked a job offer it had made to "David" Schroer (later Diane) when she disclosed her transgender status and intent to start work as a woman.<sup>57</sup> In the lawsuit that followed, the judge ruled in her favor on two alternative grounds. First, the court applied *Price Waterhouse* to find that the discrimination against Schroer was discrimination because of sex, relying on evidence that the hiring supervisor was uncomfortable with the fact that someone she had come to know as a man would be wearing a dress and presenting as a woman in contravention of stereotyped masculinity.<sup>58</sup> Then the court went on to hold that even in the absence of sex stereotyping, the employer had violated Title VII because refusing to hire someone who changes their sex targets that person because of sex.<sup>59</sup> It is therefore sex discrimination in the same sense that refusing to hire someone because they have converted from one religion to another is discrimination on the basis of religion.<sup>60</sup> The reasoning in this opinion extends a broader range of protection to transgender plaintiffs than *Price Waterhouse* would alone because it is available to

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court vindicate my rights as a gender non-conforming man" (internal quotation marks omitted); Storow, *supra* note 38, at 149–50.

55. Devi Rao, *Gender Identity Discrimination Is Sex Discrimination: Protecting Transgender Students from Bullying and Harassment Using Title IX*, 28 WIS. J.L. GENDER & SOC'Y 245, 252, 263 (2013); cf. Judith Butler, *Appearances Aside*, 88 CALIF. L. REV. 55, 62 (2000) ("Antidiscrimination law participates in the very practices it seeks to regulate; antidiscrimination law can become an instrument of discrimination in the sense that it must reiterate—and entrench—the stereotypical or discriminatory version of the social category it seeks to eliminate.").

56. 577 F. Supp. 2d 293 (D.D.C. 2008).

57. *Id.* at 295–99.

58. *Id.* at 305. The judge in this case had, in an earlier decision, acknowledged the potential limitations of framing the discrimination in Schroer's case as that of gender nonconformity:

Schroer is not seeking acceptance as a man with feminine traits. She seeks to express her female identity, not as an effeminate male, but as a woman. She does not wish to go against the gender grain, but with it. She has embraced the cultural mores dictating that "Diane" is a female name and that women wear feminine attire. The problem she faces is not because she does not conform to the Library's stereotypes about how men and women should look and behave—she adopts those norms. Rather, her problems stem from the Library's intolerance toward a person like her, whose gender identity does not match her anatomical sex.

*Schroer v. Billington*, 424 F. Supp. 2d 203, 210–11 (D.D.C. 2006). The court went on to deny the Library's motion to dismiss anyway. *Id.* at 213.

59. *Schroer*, 577 F. Supp. 2d at 307–08.

60. *Id.* at 306.

transgender plaintiffs even in the absence of evidence that the employer's motivation for discrimination was the plaintiff's gender nonconformity rather than her transsexuality per se.<sup>61</sup>

While *Schroer's* "change of sex" rationale has yet to be cited by other federal courts, the EEOC incorporated its rationale into a decision that broadly construed the agency's jurisdiction to investigate claims of sex discrimination filed by transgender employees. In *Macy v. Holder*,<sup>62</sup> the EEOC determined that a transgender applicant who was rejected for a job with a federal agency had successfully alleged a complaint of sex discrimination.<sup>63</sup> The EEOC employed a broad reading of *Price Waterhouse* to conclude that gender nonconformity includes not only visibly transitioning on the job, as in *Smith*, but even simply identifying as transgender.<sup>64</sup> Moreover, the EEOC held that transgender plaintiffs were not limited to alleging claims of sex discrimination based only on the gender nonconformity approach.<sup>65</sup> An employer who discriminates because an employee changes sex or identifies as transgender has "relied on [the employee's] gender in making its decision," which is prohibited under Title VII.<sup>66</sup>

The EEOC's decision employs a broad definition of sex discrimination—broader than any courts have used to date. While it is likely to be influential on the courts, the extent of this influence remains to be seen. Many courts will likely defer to it as a well-reasoned interpretation of Title VII. However, *Macy's* status as an adjudicatory decision that is technically only binding on the federal sector does not necessarily require courts to extend deference in cases involving private employers.<sup>67</sup> As a result, courts could still reject it on grounds that it conflicts with earlier precedent from the *Ulane* line of cases that foreclose Title VII protection from discrimination because of one's transgender status.

## II. TITLE VII'S ANTI-RETALIATION PROVISION AND LGBT PLAINTIFFS' REASONABLE BELIEFS

As the previous Part makes clear, Title VII offers LGBT plaintiffs limited means to redress direct instances of employment discrimination. As this Part will show, LGBT plaintiffs have also had limited success pursuing retaliation claims in cases where the predicate discrimination

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61. See generally Lee, *supra* note 47.

62. *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

63. *Id.* at \*1.

64. *Id.* at \*7–8.

65. *Id.* at \*10.

66. *Id.* (alteration in original) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) (internal quotation mark omitted)).

67. Cody Perkins, Comment, *Sex and Sexual Orientation: Title VII After Macy v. Holder*, 65 ADMIN. L. REV. 427, 437 (2013) ("Similarly, EEOC adjudicatory decisions are granted some judicial deference, and although they are not binding on anyone outside the federal sector, they are often treated as indications of what will constitute 'good practice' in the future.").

was not itself unlawful. As explained in this Part, courts have taken an increasingly narrow view of conduct that is protected under Title VII's prohibition against retaliation. Notwithstanding critiques of this problematic approach, it has been employed in cases involving gay plaintiffs. Yet, the fact that some courts have read the law to offer broader protection against gay and other LGBT plaintiffs suggests and lays the groundwork for a more promising alternative approach.

#### A. Title VII's Anti-Retaliation Provision

Protection against retaliation is essential to the enforcement of anti-discrimination laws.<sup>68</sup> Without it, whistleblowers would be reluctant to report and seek remedies to redress discrimination.<sup>69</sup> Accordingly, Congress included express statutory language in Title VII that prohibits employers from retaliating against employees who complain, whether formally or informally, about discrimination made unlawful by the statute.<sup>70</sup> However, courts have long held that a plaintiff may prevail under Title VII's anti-retaliation provision even if the conduct complained of (i.e., the predicate discrimination) is not actually unlawful.<sup>71</sup> As Professor Brake explains, "[p]rotection from retaliation would mean little if it were otherwise."<sup>72</sup> Most employees do not have specific knowledge about discrimination law, and even those who do would be hard pressed to predict how judges and juries would apply that law in a specific case.<sup>73</sup> If protection from retaliation was contingent on the employee guessing right in the face of such uncertainty, many would avoid the risky act of whistleblowing.<sup>74</sup>

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68. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005) (interpreting Title IX's implied right of action to include retaliation claims, even though such protections are not expressly contained in the statute); see also Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 377–78 (2010).

69. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 25–26 (2005).

70. 42 U.S.C. § 2000e-3(a) (2012) states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter].

The two clauses defining protected conduct under this provision are generally known as the opposition clause and the participation clause, respectively. See, e.g., DIANNE AVERY ET AL., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 165, 168 (8th ed. 2010).

71. *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1004–06 (5th Cir. 1969); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (extending this rationale to the opposition clause as well by reasoning that EEOC enforcement “would be severely chilled” if Title VII’s protection against retaliation under the participation clause only applied to meritorious EEOC complaints).

72. Brake, *supra* note 69, at 76.

73. *Id.* at 76–77.

74. *Id.* at 77; Pizer et al., *supra* note 1, at 734 (“LGBT employees are often reluctant to pursue claims for fear of retaliation or of ‘outing’ themselves further in their workplace.”).

### B. The Reasonable Belief Standard

When an employee complains of discrimination in the context of a formal EEOC proceeding, the employee is generally protected from retaliation as long as the underlying complaint is not false or malicious.<sup>75</sup> However, in informal contexts, such as an internal complaint to the employer, an employee's protection is more narrow, extending only to situations where the employee has a good faith, reasonable belief that the predicate discrimination is unlawful.<sup>76</sup> Early courts applied this standard to broaden, not narrow, the range of conduct protected from retaliation. Compared to the possible alternative of requiring plaintiffs to prove that the underlying discrimination was unlawful,<sup>77</sup> the "reasonable belief" standard allowed for robust protection against retaliation while still ensuring employers' freedom to address "malicious accusations and frivolous claims."<sup>78</sup> Increasingly, however, courts are raising the bar on what constitutes a reasonable belief and using that requirement as grounds to deny plaintiffs' retaliation claims.<sup>79</sup>

For example, in *Clark County School District v. Breeden*,<sup>80</sup> the Supreme Court denied a plaintiff's retaliation claim after noting that "no one could reasonably believe that the [alleged predicate discrimination] violated Title VII."<sup>81</sup> In that case, an employee alleged that she was transferred as punishment for complaining internally about sexual harassment arising from a one-time, situation-appropriate exchange in which a supervisor repeated another person's sexual comment in the plaintiff's presence.<sup>82</sup> Because sexual harassment must be "severe or

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75. *Pettway*, 411 F.2d at 1007. *But see* Lawrence D. Rosenthal, *Reading Too Much Into What the Court Doesn't Write: How Some Federal Courts Have Limited Title VII's Participation Clause's Protections After Clark County School District v. Breeden*, 83 WASH. L. REV. 345, 357 (2008) (describing several cases that have, post-*Breeden*, imposed a "reasonable belief" requirement for retaliation cases under the participation clause as well (internal quotation marks omitted)).

76. *See, e.g., Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982). The court stated:

The mistake must, of course, be a sincere one; and presumably it must be reasonable . . . for it seems unlikely that the framers of Title VII would have wanted to encourage the filing of utterly baseless charges by preventing employers from disciplining the employees who made them. But it is good faith and reasonableness, not the fact of discrimination, that is the critical inquiry in a retaliation case.

*Id.*

77. Brianne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1471 (2007).

78. *Id.* at 1472 (quoting *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1020 (D.C. Cir. 1981)).

79. *Moberly*, *supra* note 68, at 448.

80. 532 U.S. 268 (2001) (*per curiam*).

81. *Id.* at 270.

82. *Id.* at 269. Specifically, the plaintiff complained about an exchange that occurred when she, her supervisor, and "another male employee" were meeting to review reports about four individuals who had applied for a job with the school district. *Id.* The report on one of the applicants recounted that he had:

[O]nce commented to a co-worker, "I hear making love to you is like making love to the Grand Canyon." . . . [T]he [plaintiff's] supervisor read the comment aloud, [and then]

pervasive” in order to be actionable, the Court refused to recognize that the plaintiff’s complaint about a seemingly minor incident warranted protection from retaliation.<sup>83</sup>

Other cases since *Breeden* have also denied protection from retaliation to plaintiffs who complained about harassment that they could not have reasonably believed was severe or pervasive, including in cases where the predicate harassment was arguably more serious than what *Breeden* herself had challenged.<sup>84</sup> Retaliation plaintiffs have been thwarted by other mistakes of law regarding the predicate discrimination as well.<sup>85</sup>

### C. Critiques of the Narrowing of Reasonable Belief

Critics have argued that *Breeden*’s narrow reading of the reasonable belief standard threatens to undermine the enforcement-enhancing purpose of Title VII’s anti-retaliation provision.<sup>86</sup> Professor Rosenthal argues that it “forces employees to essentially become employment law experts before deciding whether to report behavior they believe is unlawful.”<sup>87</sup> Professor Brake takes this point further, arguing that—especially as to mistakes about whether harassment is pervasive—“[t]he problem is not simply that most people lack the legal expertise to ascertain where that line begins and ends, but that the uncertainties of litigation prevent such a determination from being made in advance.”<sup>88</sup> In other legal contexts, courts do not require a “reasonable person” to have expertise she or he does not have reason to possess,<sup>89</sup> and such requirements in retaliation

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stated, “I don’t know what that means.” The other employee then said, “Well, I’ll tell you later,” and both men chuckled.

*Id.* (citations omitted).

83. *Id.* at 270–71 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998)).

84. *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 336, 342–43 (4th Cir. 2006) (black plaintiff suffered reprisals and was ultimately fired for reporting an employee who said, in the wake of the capture of the D.C. sniper, “They should put those two black monkeys in a cage with a bunch of black apes and let the apes f—k them” (internal quotation marks omitted)); *George v. Leavitt*, 407 F.3d 405, 408 (D.C. Cir. 2005) (black female plaintiff from Trinidad alleged she was punished after reporting insulting and demeaning statements of her co-workers: “On different occasions, she was told by three separate employees to ‘go back to Trinidad’ . . . . On these and other occasions, her co-workers shouted at her, told her that she should never have been hired, and told her to ‘shut up.’”).

85. Outside of the employment context, an appellate court held that a plaintiff was not protected from retaliation because he had complained about employer practices that had a disparate impact based on race, a cause of action that had earlier been foreclosed by the Supreme Court’s interpretation of Title VI’s implied private right of action. *Peters v. Jenney*, 327 F.3d 307, 310, 315 (4th Cir. 2003).

86. Brake, *supra* note 69, at 81–83; Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII’s Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1130 (2007).

87. Rosenthal, *supra* note 86, at 1131; see also Gorod, *supra* note 77, at 1492–93.

88. Brake, *supra* note 69, at 89.

89. See, e.g., RESTATEMENT (SECOND) OF TORTS § 290 cmt. f (1965) (“If the actor has special knowledge, he is required to utilize it, but he is not required to possess such knowledge, unless he holds himself out as possessing it or undertakes a course of conduct which a reasonable man would recognize as requiring it.”); Gorod, *supra* note 77, at 1495 n.114 (contrasting the narrowing view of



cases evoke harsh consequences on a complaining employee who gets it wrong. If she complains too soon, before the harassment has become pervasive, then she is vulnerable to retaliation for which she cannot turn to Title VII for redress. If she complains too late, once the harassment has become pervasive, she must not only endure additional harassment,<sup>90</sup> but she may also be unable to prevail on the other elements of an eventual harassment claim, for two reasons. For one, her employer can argue that her failure to complain suggests that the harassment was not “unwelcome,” one of the required elements for actionable harassment.<sup>91</sup> The employer can also argue that the employee’s failure to complain sooner was unreasonable, which gives rise to an employer’s affirmative defense against vicarious liability for harassment committed by a supervisor.<sup>92</sup> Narrow interpretations of reasonable belief threaten employers’ interests as well. When employees are deterred from complaining about problems in the workplace, employers lack the information they require to stop small problems from becoming big ones that deplete employee productivity and morale. Fearing retaliation, employees who would have otherwise complained internally may also choose instead to file formal EEOC complaints, which are costlier and more time-consuming to defend.<sup>93</sup>

For these reasons, some have argued that the courts should abandon the requirement that the plaintiff’s belief be objectively reasonable, leaving in place only the requirement of a good faith belief.<sup>94</sup> Employers would still be able to take adverse action against an employee who has filed malicious or frivolous claims and, in the rest of cases, can protect themselves against retaliation claims by refraining from taking punitive action against a good faith complainant. This approach, while sensible, may be unfeasible given the widespread adoption of the reasonable belief standard in the wake of the Supreme Court’s endorsement in *Breedon*.<sup>95</sup> Plaintiffs may have better outcomes by making stronger arguments about the reasonableness of their beliefs. In this spirit, other critics advocate for pushing the boundaries of what ought to constitute a reasonable belief for the purposes of demarking conduct protected from retaliation. Professor Brake proposes that courts shift the vantage point of reasonableness from that of someone with knowledge of the law to that of an ordinary em-

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a reasonable mistake in retaliation law to the much more generous view of reasonable mistake that applies to defendants claiming qualified immunity).

90. *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 355 (4th Cir. 2006) (King, J., dissenting) (pointing out this “Catch-22”).

91. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (internal quotation marks omitted).

92. Gorod, *supra* note 77, at 1489; Rosenthal, *supra* note 86, at 1159–60. An employer may avoid liability for a supervisor’s harassment if (1) the employer has taken reasonable care to prevent and correct harassment, and (2) it was unreasonable for employee not to avail herself of employer’s prevention/correction opportunities. *E.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

93. Gorod, *supra* note 77, at 1507–08; Rosenthal, *supra* note 86, at 1164–65.

94. Gorod, *supra* note 77, at 1500; Rosenthal, *supra* note 86, at 1149.

95. Rosenthal, *supra* note 86, at 1135, 1138 (describing how *Breedon* motivated some courts to adopt an objective test).

ployee.<sup>96</sup> She also suggests that courts could set limits on the reasonable belief standard by asking “whether the plaintiff can make a reasoned case that the practices opposed interfere with the goals and objectives of discrimination law.”<sup>97</sup> Another commentator suggests reforming how the reasonable belief standard applies to cases of predicate harassment in particular by accepting that an employee reasonably believes that an isolated incident of harassment is unlawful if the incident, when repeated, would constitute a Title VII violation.<sup>98</sup> As explained in Part III, cases involving retaliation against LGBT plaintiffs who have complained of harassment are particularly useful for advancing robust and persuasive arguments for broadening the reasonable belief doctrine along the lines these commentators have proposed. In addition to helping LGBT plaintiffs find relief under a law that does not provide direct protection, a focus on these cases could lead the push back on this encroaching doctrine.

#### *D. Judicial Decisions Ignoring Gay Plaintiffs’ Reasonable Belief*

Recently, LGBT plaintiffs have been among those whose retaliation claims have been victims of the narrowing reasonable belief doctrine. For example, in *Larson v. United Air Lines*,<sup>99</sup> a gay customer service manager alleged that he was furloughed by the airline in retaliation for complaining about anonymous letters that he perceived to be disparaging him because of his sexual orientation.<sup>100</sup> Affirming the lower court’s dismissal of this claim, the Tenth Circuit Court of Appeals rejected the argument that Larson’s complaint amounted to protected conduct.<sup>101</sup> Without citing *Breeden* or mentioning the reasonable belief standard, the court required retaliation plaintiffs to demonstrate their “opposition to a practice made an unlawful employment practice by Title VII.”<sup>102</sup> Since Title VII does not prohibit discrimination on the basis of sexual orientation, the court reasoned, Larson’s conduct was not protected from retaliation under Title VII.<sup>103</sup>

96. Brake, *supra* note 69, at 103.

97. *Id.* Similarly, another recommendation is to maintain the objective standard but to evaluate the reasonableness of the plaintiff’s belief based on the “totality of circumstances”—including among other factors whether the courts and other authorities are unanimous about whether particular conduct violates Title VII. Matthew W. Green, Jr., *What’s So Reasonable about Reasonableness? Rejecting a Case Law-Centered Approach to Title VII’s Reasonable Belief Doctrine*, 62 U. KAN. L. REV. 759, 799–800 (2014).

98. Gorod, *supra* note 77, at 1497–98.

99. 482 F. App’x 344 (10th Cir. 2012).

100. *Id.* at 345–46.

101. *Id.* at 350.

102. *Id.* at 351 (quoting *Petersen v. Utah Dep’t of Corr.*, 301 F.3d 1182, 1188 (10th Cir. 2002)) (internal quotation mark omitted).

103. *Id.* The court also rejected the argument that the predicate was discriminatory, since the first anonymous letter was severely dealt with by the airline (leaving Larson no discrimination to complain about), and the second letter did not specifically reference Larson or expressly evince hostility towards his sexual orientation. *Id.* Additionally, the court determined that Larson had not demonstrated a causal connection between his complaints about the letters and his eventual furlough, since those who had taken his complaint were not involved in the furlough decision. *Id.*

Similarly, in *Gilbert v. Country Music Association*,<sup>104</sup> the Sixth Circuit Court of Appeals affirmed the dismissal of an openly gay union member's claim that his union withheld referrals because he complained that a fellow union member had "called him a 'faggot' and threatened to stab him."<sup>105</sup> First, the court determined that the predicate harassment was not actionable sexual harassment.<sup>106</sup> Though the court recognized that Title VII protects against harassment motivated by the victim's failure to conform to gender stereotypes, the victim's same-sex orientation does not itself qualify as nonconforming behavior.<sup>107</sup> Rather, the plaintiff must be targeted for gender nonconformity in his "'behavior observed at work or affecting his job performance,' such as his 'appearance or mannerisms on the job,'"<sup>108</sup> which the plaintiff in this case did not allege.<sup>109</sup> Then, having concluded that the predicate harassment was motivated by sexual orientation rather than sex, the court dispensed Gilbert's retaliation claim in a single sentence.<sup>110</sup> Giving no consideration to whether he could have reasonably believed that the harassment was actionable, the court dismissed the retaliation claim for the simple reason that Gilbert had opposed conduct that was not itself prohibited by Title VII.<sup>111</sup>

The Seventh Circuit Court of Appeals has also rejected a gay plaintiff's retaliation claim. In *Hamner v. St. Vincent Hospital & Health Care Center, Inc.*,<sup>112</sup> the plaintiff alleged that he was terminated from his job as a nurse because he complained about a supervising doctor's harassing comments.<sup>113</sup> After a trial, the lower court granted summary judgment in favor of the hospital, which Hamner appealed.<sup>114</sup> The Seventh Circuit analyzed lengthy excerpts of Hamner's trial testimony about the nature of the internal grievance he had filed.<sup>115</sup> Despite Hamner's testimony that he believed the doctor's conduct—which included mocking him by lisping and making limp wrists—was harassment because of sex, the court read the trial transcript to support the lower court's conclusion that the doctor's "homophobia" motivated Hamner's complaint.<sup>116</sup> Yet even though the court concluded that this predicate harassment was not actionable under Title VII, the court went on to consider whether, for pur-

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104. 432 Fed. App'x 516 (6th Cir. 2011).

105. *Id.* at 518, 521.

106. *Id.* at 519.

107. *Id.* at 519–20.

108. *Id.* at 519 (quoting *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006)).

109. *Id.* at 520 (rejecting the plaintiff's allegation that "homosexual males did not conform to [the harasser's] male stereotypes" as an insufficient "formulaic recitation" of the gender nonconformity element (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (internal quotation marks omitted)).

110. *Id.*

111. *Id.*

112. 224 F.3d 701 (7th Cir. 2000).

113. *Id.* at 703.

114. *Id.*

115. *Id.*

116. *Id.* at 706 (internal quotation marks omitted).

poses of his retaliation claim, Hamner reasonably believed otherwise.<sup>117</sup> To this end, the court required that to be reasonable, the plaintiff's complaint must at least fall into a category of discrimination that is covered by Title VII, and Hamner's complaint, having been construed to be about sexual orientation rather than sex, did not qualify.<sup>118</sup>

While these three cases reach the same result, the depth of the courts' respective analyses range in their complexity. The Tenth Circuit denied the gay plaintiff's retaliation claim simply because Title VII does not cover sexual orientation.<sup>119</sup> The Sixth Circuit at least considered the possibility that the gay plaintiff might have suffered discrimination on the basis of sex, but then rejected the retaliation claim without bothering to distinguish the plaintiff's reasonable belief from the court's conclusion that he did not.<sup>120</sup> Finally, the Seventh Circuit did distinguish between actionable harassment and harassment a plaintiff reasonably could have believed was so, but nevertheless rejected the idea that a plaintiff could reasonably believe that harassment motivated by sexual orientation is prohibited.<sup>121</sup> Interestingly, the Seventh Circuit's decision in *Hamner* is the only one of the three decisions to predate *Breedon*, yet it is the only one to actually consider the reasonableness of the plaintiff's belief in the illegality of the underlying harassment. Yet, the court's analysis of that standard is arguably flawed, for two reasons. First, the court's reasonable belief analysis was limited to whether Hamner reasonably believed sexual orientation discrimination was illegal;<sup>122</sup> it did not consider whether Hamner could have reasonably believed that the sexual orientation discrimination he endured was actually, or also, discrimination because of sex—an omission made more blameworthy by the fact that the doctor's teasing included imitating the voice and gestures of stereotyped effeminate men.<sup>123</sup> The second flaw of the *Hamner* decision is that, when read together with *Breedon*, it leaves nothing left of reasonable belief and effectively requires the plaintiff to prove the illegality of the predicate discrimination.<sup>124</sup> In *Breedon*, the Court detected an unreasonable belief based on the insufficient *degree* of harassment rather than its *type*.<sup>125</sup> If

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117. *Id.* at 706–07.

118. *Id.* at 707.

119. *Larson v. United Air Lines*, 482 F. App'x 344, 351 (10th Cir. 2011).

120. *Gilbert v. Country Music Ass'n.*, 432 Fed. App'x 516, 519–20 (6th Cir. 2011).

121. *Hamner*, 224 F.3d at 706–07.

122. *Id.*

123. *Id.*

124. The Seventh Circuit's analysis of reasonable belief has not changed since *Breedon*, as more recent decisions have relied on *Hamner* for the principle that "[t]he objective reasonableness of the belief is not assessed by examining whether the conduct was persistent or severe enough to be unlawful, but merely whether it falls into the category of conduct prohibited by the statute." *Magyar v. Saint Joseph Reg'l Med. Ctr.*, 544 F.3d 766, 771 (7th Cir. 2008); *see also Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1066 (7th Cir. 2003) (rejecting retaliation claim of a heterosexual male plaintiff who complained about same-sex harassment that the court determined was not actionable).

125. *Clark Cnty. Sch. Dist. v. Breedon*, 532 U.S. 268, 270–71 (2001).

mistakes of type are also excluded from reasonable belief, as the Seventh Circuit appears to hold, there is hardly anything left for a harassed employee to be reasonably mistaken about—a result that *Breeden* itself forecloses.

*E. Judicial Decisions Affirming Gay Plaintiffs' Reasonable Belief*

Two courts have found in favor of gay plaintiffs seeking to advance retaliation claims based on predicate discrimination that turned out not to be unlawful under Title VII. In *Dawson v. Entek International*,<sup>126</sup> the plaintiff appealed the lower court's dismissal of both his hostile-environment sexual harassment claim and his claim that the employer terminated him in retaliation for reporting the harassment.<sup>127</sup> The Ninth Circuit Court of Appeals agreed that the plaintiff had not alleged actionable sexual harassment because "Dawson presented no evidence that he failed to conform to a gender stereotype" and even testified himself that he "does not exhibit effeminate traits."<sup>128</sup> Nevertheless, the court reversed the lower court's dismissal of his retaliation claim.<sup>129</sup> Without expressly addressing the reasonable belief standard, the court concluded simply that "Dawson engaged in protected activity when he visited [a person] in human resources to discuss his treatment and file a complaint. This was a complaint to human resources staff based directly on sexual orientation discrimination."<sup>130</sup> Though the analysis is sparse, the court seemed to have considered the plaintiff's belief that Title VII prohibits sexual orientation discrimination to be a reasonable one.

In a later decision applying *Dawson*, a federal district court in California suggests as much. In that case, *McCarthy v. R.J. Reynolds Tobacco Co.*,<sup>131</sup> two employees prevailed at trial on a claim that their employer took adverse action against them after they complained about sexual harassment as well as the harassment of their gay co-worker.<sup>132</sup> The employer challenged the jury instruction, which defined activity protected from retaliation as "complaining to the defendant . . . based on the plaintiff's reasonable belief that her employer was engaged in unlawful conduct, which includes subjecting an employee to a sexually hostile work environment or discriminating against an employee on account of race, age, sex, or *sexual orientation*."<sup>133</sup> Relying on the Ninth Circuit's decision in *Dawson*, the court affirmed that the jury was properly instructed to consider complaints about sexual orientation to be protected activity

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126. 630 F.3d 928 (9th Cir. 2011).

127. *Id.* at 932.

128. *Id.* at 937.

129. *Id.*

130. *Id.* at 936.

131. No. CIV. 2:09-2495 WBS DAD, 2011 WL 4006634 (E.D. Cal. Sept. 8, 2011).

132. *Id.* at \*1.

133. *Id.* at \*3.

for purposes of Title VII's anti-retaliation provision.<sup>134</sup> In so doing, the court supplied some of the missing analysis that would have made the *Dawson* decision more clear. In particular, the court raised and applied the reasonable belief standard:

There cannot be any doubt that the plaintiffs in this case were reasonable in believing that Title VII prohibited defendant from terminating their coworker based on his sexual orientation. Not only has there been a growing gay rights movement in this country, the courts have also recognized sexual orientation as a status that merits heightened protection. Accordingly, based on the Ninth Circuit's holding in *Dawson* and because plaintiffs were reasonable in believing that Title VII prohibited defendant from discriminating based on sexual orientation, the court's inclusion of "sexual orientation" in Instruction No. 11 was a correct statement of the law and does not merit a new trial.<sup>135</sup>

In support of the second sentence quoted above, the court cited judicial decisions ruling in favor of same-sex marriage and narrowing the Defense of Marriage Act, law review articles arguing for expansive definitions of sexual harassment under Title VII that would include sexual orientation discrimination, provisions of California law that prohibit discrimination on the basis of sexual orientation, and federal regulatory policy construing the Civil Service Reform Act of 1978 to include discrimination on the basis of sexual orientation.<sup>136</sup> This decision is a promising example of how courts could construe reasonable belief, and it will serve as a foundation for some of the arguments provided in the next Part.

In addition to these two cases affirming that complaining about anti-LGBT harassment is protected conduct, there have also been decisions where the courts assumed *arguendo* that was the case. While not as useful to LGBT plaintiffs as *Dawson* or *McCarthy*, these decisions are at least worth noting for the mere fact that even outside of the Ninth Circuit, some courts, unlike those in *Larson* and *Gilbert*, refrain from casually restricting the scope of protected conduct to exclude discrimination reported by LGBT plaintiffs. In one such case, a federal district court in New York cited the reasonable belief standard as the basis for its assumption that a lesbian plaintiff's complaints were protected from retaliation under Title VII, even where the court had already determined that the predicate harassment was itself not actionable.<sup>137</sup> The court preferred

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134. *Id.* at \*3–4.

135. *Id.* at \*4 (footnote omitted).

136. *Id.* at \*4 n.5.

137. *Jantz v. Emblem Health*, No. 10 Civ. 6076(PKC), 2012 WL 370297, at \*13 n.9 (S.D.N.Y. Feb. 6, 2012). Though the plaintiff alleged that she was targeted for harassment because of her

instead to grant summary judgment on other grounds, namely, that she had not proffered sufficient evidence of a causal connection between the protected activity and her eventual termination.<sup>138</sup> Similarly, a federal court in Alabama assumed for argument's sake that a transgender plaintiff's complaint about sex discrimination amounted to protected conduct,<sup>139</sup> even though the sex discrimination claim itself had been dismissed for lack of sufficient evidence from which to construe bias.<sup>140</sup> Here, too, the retaliation claim failed on other grounds.<sup>141</sup>

### III. TOWARDS A MORE ROBUST ANALYSIS OF LGBT PLAINTIFFS' REASONABLE BELIEFS

Discrimination against LGBT employees is a pervasive problem that advocates should challenge by all available means. Political efforts aimed at persuading Congress to pass a federal law that prohibits employment discrimination on the basis of sexual orientation and gender identity<sup>142</sup> will, when successful, largely close the gap that leaves LGBT Americans vulnerable to discrimination under federal law.<sup>143</sup> In the

failure to conform to gender stereotypes in her attraction to and relationship with a female partner, the court construed this as sexual orientation discrimination not actionable under Title VII. *Id.* at \*7.

138. *Id.* at \*7.

139. *Parris v. Keystone Foods, LLC*, 959 F. Supp. 2d 1291, 1301 (N.D. Ala. 2013); *see also* *Sturchio v. Ridge*, No. CV-03-0025-RHW, 2005 WL 1502899, at \*10 (E.D. Wash. 2005) ("It is undisputed that the Plaintiff [who complained about sex discrimination related to her gender transition] engaged in protected activity.").

140. *Parris*, 959 F. Supp. 2d at 1301.

141. *Id.* at 1312.

142. The latest version of the perennially-proposed Employment Non-Discrimination Act (ENDA) would do exactly that. See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4(a) (2013), which states:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity.

*Id.*

143. "Largely" refers to the strong possibility that Congress would pass a version of ENDA that exempts religious organizations, or possibly even secular employers with a religious objection, from having to comply. Indeed, the recent version of ENDA passed by the Senate contained an exemption for religious organizations, though an amendment that would have expanded the exemption to include objecting secular employers failed to pass. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 6; Ramsey Cox, *Senate Passes ENDA Amendment Designed to Protect Churches*, THE HILL (Nov. 6, 2013, 12:15 PM), <http://thehill.com/blogs/floor-action/senate/189434-senate-adopts-amendment-to-enda-aimed-at-protecting-churches>. In contrast, Title VII only permits such employers to discriminate against non-ministerial employees on the basis of religion, not on the basis of other protected characteristics (the ministerial exemption, in contrast, applies to discrimination on the basis of religion and other protected characteristics). 42 U.S.C. § 2000e-1(a) (2012) ("This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (recognizing religious institution's exemption from antidiscrimination laws in the hiring of those it deems to be ministers). Should any version of a religious exemption be included in the version of ENDA that ultimately becomes law, Title VII would remain the only federal law potentially available to LGBT non-ministerial employees to challenge discrimination by religious employers who are exempt from ENDA.

meantime, of course, advocates can also employ a litigation strategy that seeks to incrementally expand courts' interpretation of sex discrimination covered by Title VII. At the same time, advocates should not ignore opportunities to also push back on the courts' narrowing protection against retaliation for LGBT employees who reasonably believe that discrimination they have suffered is unlawful.<sup>144</sup> By pushing equally hard on retaliation claims, advocates increase a client's chances of obtaining some relief. Additionally, the success of such efforts would strengthen the law's protection against retaliation, which in turn could motivate LGBT employees to speak up about discrimination on the job. Such whistle-blowing is the crucial precursor to litigation that continues to push for robust interpretations of sex discrimination under Title VII. It can also yield examples useful in the political arena to persuade Congress and those with influence that the Employment Non-Discrimination Act (ENDA) is necessary. In other words, it is worth pushing hard on retaliation claims, not only for the individual litigant's sake, but in the interest of supporting the efforts to challenge anti-LGBT discrimination on all respective fronts. The remainder of this Part will explore arguments that could be useful to this end.

*A. Employees Might Reasonably Believe That Discrimination Based on Sexual Orientation and Gender Identity Is Already Prohibited by Federal Law*

When LGBT employees report that they have been the victim of unlawful harassment, they may be doing so on the basis of a mistaken, yet reasonable, belief that federal law bans discrimination based on sexual orientation and gender identity. Indeed, surveys show that such protections are not only favored by a majority of Americans, but they are also widely assumed to already exist.<sup>145</sup> As the federal district court noted in *McCarthy*, this belief seems reasonable when viewed against the backdrop of LGBT (particularly lesbian and gay) victories in the courts and in

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144. Cf. *Kiley v. Am. Soc'y for Prevention of Cruelty to Animals*, 296 Fed. App'x 107, 108 (2d Cir. 2008) (plaintiff who lost on sexual orientation and sex stereotyping claim did not even appeal dismissal of his retaliation claim); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 761 n.1 (6th Cir. 2006) (Vickers "fail[ed] to make any argument regarding his Title VII retaliation claim," so therefore it was waived).

145. A survey by the Center for American Progress found that "9 of out [sic] 10 voters erroneously think that a federal law is already in place protecting gay and transgender people from workplace discrimination." Krehely, *supra* note 10; see also Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209, 210-11 (2012). In her article Schwartz states:

[A] 2007 poll found that only one-third of American adults were aware that federal law . . . does not provide protection for employees on the basis of sexual orientation. At the same time, public opinion polls suggest that Americans do not find the idea of protection against employment discrimination based on sexual orientation particularly controversial. A 2008 Gallup poll found that support for homosexuals having equal rights in job opportunities has jumped from fifty-six percent in 1977 to eighty-nine percent.

*Id.* (footnotes omitted).



the political arena.<sup>146</sup> Marriage equality is arguably a more controversial prospect than employment nondiscrimination, so the fact that same-sex marriage is now legal in a majority of states (thirty-six as of this writing)<sup>147</sup>—as well as recognized for purposes of federal law<sup>148</sup>—could realistically contribute to the public perception that equality in the workplace is at least as secure. In the context of employment, LGBT rights are also on the rise. Twenty-one states and the District of Columbia ban employment discrimination on the basis of either sexual orientation or gender identity, as do more than two hundred cities and counties.<sup>149</sup> Additionally, in 2011 Congress repealed the most notorious example of pervasive employment discrimination against gays and lesbians—the military’s Don’t Ask Don’t Tell policy.<sup>150</sup> The widespread erroneous belief in federal protection against harassment of gay workers could even partially derive from the Supreme Court’s decision in *Oncale*,<sup>151</sup> which did not involve a gay plaintiff but was widely reported as a gay-rights victory.<sup>152</sup> At the same time, news of courtroom victories for LGBT plaintiffs such as Diane Schroer does not necessarily emphasize the nuances of the judge’s sex discrimination rationale,<sup>153</sup> which could also lead the general public to erroneously believe the law protects gay, lesbian, bisexual, and transgender individuals by virtue of their status as such.<sup>154</sup>

As the district court decision in *McCarthy* shows, it is possible for courts to accept that a whistleblower reasonably believes that federal law prohibits status-based discrimination against LGBT workers based on these examples of momentum in the gay-rights movement, both in the employment context and in general. Polling data about the public’s mistaken belief that such laws already exists makes this argument even stronger.<sup>155</sup> Its weakness, however, is that it requires courts to accept what I will call a “categorical mistake” (believing a certain category of discrimination is prohibited when it is not) as a reasonable belief, which

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146. *McCarthy v. R.J. Reynolds Tobacco Co.*, No. CIV. 2:09-2495 WBS DAD, 2011 WL 4006634, at \*4 n.5 (E.D. Cal. Sept. 8, 2011).

147. See *Same Sex Marriage Laws*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx> (last updated Jan. 19, 2015).

148. See *United States v. Windsor*, 133 S. Ct. 2675, 2691–93 (2013).

149. Pizer et al., *supra* note 1, at 755, 757.

150. Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111–321, § 2(f)(1)(A), 124 Stat. 3515, 3516 (2010).

151. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); see *supra* Part I.C.

152. E.g., Joan Biskupic, *Same-Sex Harassment Is a No-No, Says Court; Landmark Ruling Covers Situations with Both Gay and Non-Gay Participants*, MOBILE REG., Mar. 5, 1998, at 1A; Richard Carelli, *Same-Sex Harassing Is Illegal: Employer, Gay-Rights Groups Praise Supreme Court Ruling*, ST. PAUL PIONEER PRESS, Mar. 5, 1998, at 1A; David Jackson, *Court Ruling on Same-Sex Harassment Also Victory for Gay, Lesbian Workers*, DALL. MORNING NEWS, Mar. 5, 1998.

153. Jesse J. Holland, *Judge Rules Transgender Discrimination Is Illegal*, STAR-LEDGER (Newark), Sept. 20, 2008, at 16; *Former Army Commander Wins Transgender Lawsuit*, TIMES UNION (Albany), Sept. 20, 2008, at 5.

154. Gorod, *supra* note 77, at 1494 (“Moreover, employees’ understandings of what constitutes harassment will be shaped in large part by media accounts.”).

155. See *supra* note 145.

some courts have already refused to do.<sup>156</sup> This tendency, however, demonstrably undermines Title VII enforcement. For the reasonable belief doctrine to mean anything at all, it has to allow whistleblowers to make some kinds of mistakes about the legal status of predicate discrimination. Especially where courts also insist on rejecting reasonable mistakes about the pervasiveness that harassment must reach to be actionable, rejecting reasonable categorical mistakes leaves effectively nothing left for an employee to be reasonably mistaken about. This result would eviscerate a doctrine that is both longstanding and that enjoys the apparent endorsement of the Supreme Court,<sup>157</sup> and ought to be challenged as such.

*B. Employees Might Reasonably Believe That Anti-LGBT Discrimination Is Also Prohibited Sex Discrimination*

When LGBT plaintiffs report harassment or other discrimination that turns out not to be unlawful, they could also reasonably be mistaken in believing that they were complaining about actionable sex discrimination. This is because when targeted for discrimination, sex, gender, and sexual orientation are often, and reasonably, conflated. Sex is widely understood to refer to one's anatomical status as male or female.<sup>158</sup> Gender is the socially-prescribed roles associated with sex, i.e., attributes that are masculine or feminine.<sup>159</sup> Sexual orientation is an individual's sexual or romantic attraction to either members of the same, other, or both sexes.<sup>160</sup> To say that sex and gender are conflated in our culture is to say that society generally expects one's anatomical sex to forecast much about an individual's behavior, personality, appearance, interests, and qualities. Sexual orientation is also conflated with both sex and gender. Society expects those of the male sex to be sexually attracted to those of the female sex; heterosexuality is part of what it is to be masculine.<sup>161</sup> If society conflates sex, gender, and sexual orientation, then one could reasonably perceive that the mindset of a discriminating employer likely follows suit.

To put this more concretely, imagine a hypothetical gay employee. He complains to his employer about co-workers who harass him verbally and physically, regularly calling him a faggot. Whether or not this complaint is protected from retaliation depends on whether he reasonably believes the harassment to be motivated by gender nonconformity. Of course, the co-workers' use of the word "faggot" implies animus towards

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156. See *supra* note 85 and Part II.D.

157. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001).

158. Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to its Origins*, 8 YALE J.L. & HUMAN. 161, 164 (1996).

159. *Id.*

160. *Id.*

161. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196.

his sexual orientation, which the courts do not see as synonymous with gender.<sup>162</sup> But the employee may still reasonably perceive that his masculinity is ultimately, or simultaneously, the target. Because he does not date and sleep with women, his masculinity does not measure up to his co-workers' expectations about the male sex. To him, this situation may be as much about gender as harassment mocking him for effeminate mannerisms. Because it is only courts' esoteric concerns about "bootstrapping" that keep them from reading *Price Waterhouse* to prohibit the "faggot" situation as well as the harassment based on his effeminate mannerisms, they should forgive the average employee who has not read the case law for not intuiting this distinction.

### 1. Reasonableness Supported by Social Science Research

Social science research validates the reasonableness of viewing anti-gay harassment as a means of policing gender. Sociologist Michael Kimmel, for example, describes homophobia as a "central organizing principle of our cultural definition of manhood."<sup>163</sup> In our patriarchal society, men ascribe power to themselves by calling out other men's gender nonconformity—an act that reaffirms their own compliance with "hegemonic" masculinity, the version of masculinity that is most powerful in society.<sup>164</sup> Hegemonic masculinity requires the "relentless repudiation of the feminine," including, perhaps especially, the "feminine" sexual practice of having or desiring sex with men.<sup>165</sup> Anti-gay harassment, then, is a tool for generating and assigning male privilege.<sup>166</sup>

Researchers have confirmed that heterosexual men's negative attitudes about homosexuality derive from its perceived threat to their masculinity, rather than aversion to homosexual orientation per se.<sup>167</sup> The connection between masculinity and homonegativity can also be seen in research documenting heterosexual men's (but not heterosexual wom-

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162. See *supra* note 36.

163. Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in *THEORIZING MASCULINITIES* 119, 131 (Harry Brod & Michael Kaufman eds., 1994).

164. See *id.* at 124–25, 131.

165. *Id.* at 125.

166. *Id.* at 131–32; see also MICHAEL A. MESSNER, *TAKING THE FIELD: WOMEN, MEN, AND SPORTS* 67–68 (2002); C.J. PASCOE, *DUDE, YOU'RE A FAG: MASCULINITY AND SEXUALITY IN HIGH SCHOOL* 52–83 (2007).

167. Michelle Davies, *Correlates of Negative Attitudes Toward Gay Men: Sexism, Male Role Norms, and Male Sexuality*, 41 J. SEX RES. 259, 259 (2004); Scott W. Keiller, *Masculine Norms as Correlates of Heterosexual Men's Attitudes Toward Gay Men and Lesbian Women*, 11 PSYCHOL. MEN & MASCULINITY 38, 48 (2010).

en's) less favorable view of gay men than lesbians,<sup>168</sup> and the disparaging of effeminate gay men within the gay-male community.<sup>169</sup>

## 2. Reasonableness Supported by Dicta of a Federal District Court

In addition to scientific authority, legal authority also sometimes recognizes the inherent interrelation of sexual orientation, gender, and sex—further marking as “reasonable” an employee’s impression of anti-gay harassment being motivated by gender. In *Centola v. Potter*,<sup>170</sup> a federal district court in Massachusetts held in favor of a gay-male employee whose co-workers used anti-gay slurs and teased him about being gay.<sup>171</sup> Though holding that the plaintiff had provided sufficient evidence that he was targeted for gender-nonconforming appearance and behavior, the court went on to say:

The gender stereotype at work here is that “real” men should date women, and not other men. Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what “real” men do or don’t do.<sup>172</sup>

To be sure, the dicta quoted here, over ten years old, still represents an extreme minority view among the federal courts, which generally do not view homosexuality as a gender nonconformity for purposes of applying Title VII.<sup>173</sup> But the fact that it has not convinced the majority of courts to recognize anti-gay harassment as sex discrimination does not foreclose its value in retaliation cases by serving as a testament to the reasonableness of that belief.<sup>174</sup>

168. Gregory M. Herek, *Sexual Prejudice and Gender: Do Heterosexuals' Attitudes Toward Lesbians and Gay Men Differ?*, 56 J. SOC. ISSUES 251, 255 (2000).

169. Francisco J. Sánchez & Eric Vilain, “Straight-Acting Gays”: *The Relationship Between Masculine Consciousness, Anti-Effeminacy, and Negative Gay Identity*, 41 ARCHIVES SEXUAL BEHAV. 111, 112 (2012).

170. 183 F. Supp. 2d 403 (D. Mass. 2002).

171. *Id.* at 407.

172. *Id.* at 410 (footnote omitted). It is also worth noting that the *Centola* court also went on to consider the plaintiff’s retaliation claim and, in that context, persuasively dispensed with the employer’s argument that the employee had not engaged in protected conduct because he did not call it sexual harassment when he reported it. *Id.* at 412. It was enough to the court that the plaintiff “presented to his employers . . . events that, viewed in the light most favorable to him, constituted discrimination against him on the basis of his sex due to sexual stereotyping.” *Id.*

173. Though, it was cited recently by a federal district court in Virginia, which rejected a defendant’s motion to dismiss a Title VII case involving anti-gay harassment. *Henderson v. Labor Finders of Va., Inc.*, No. 3:12cv600, 2013 WL 1352158, at \*4 (E.D. Va. Apr. 2, 2013) (citing *Centola*, 183 F. Supp. 2d at 408–09).

174. See Gorod, *supra* note 77, at 1495–96 (“If the courts cannot agree, how are the individual citizens supposed to know?”).

### 3. Reasonableness Supported by the Emerging Position of the EEOC

In further support of the reasonableness of an employee's belief that Title VII prohibits anti-LGBT discrimination, the EEOC has signaled that it, too, shares this belief. For one thing, the EEOC's interpretation of sex discrimination in *Macy* should not only support the reasonableness of any transgender plaintiff's belief that discrimination is actionable, it is also broad enough to permit the conclusion that homosexuality, too, is protected from discrimination under Title VII. For one thing, the EEOC endorsed a broad reading of *Price Waterhouse* that "gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms."<sup>175</sup> The EEOC did not say "only those gender-based expectations or norms related to how the employee behaves or appears in the workplace."<sup>176</sup> Additionally, the EEOC broadly read *Price Waterhouse*'s admonition that "an employer may not take gender into account in making an employment decision" to provide another reason, in addition to sex stereotyping, why transgender discrimination is actionable sex discrimination.<sup>177</sup> An employer who discriminates against a gay or lesbian employee is taking gender into account in an equally broad way, in that the employer is considering the gender of the employee relative to the gender of the person to whom he or she is sexually attracted.<sup>178</sup>

The EEOC spells this connection out more expressly in two separate, nonbinding decisions from 2011. In one, a gay employee filed a complaint against his employer, the Postal Service, to challenge harassment by his co-workers that stemmed from the public announcement of his wedding to another man.<sup>179</sup> The agency concluded that the employee stated a claim of plausible sex discrimination because he essentially argued that the harassment was motivated "by [the harassing co-worker's] attitudes about stereotypical gender roles in marriage."<sup>180</sup> In the other case, the EEOC determined that a lesbian employee, chided by her manager about her presumed sexual practices, had stated an actionable claim for sexual harassment, having "alleged that [the manager's] comment

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175. *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

176. Of course, as discussed in the text at notes 34–35, *supra*, this position conflicts with that of courts like the Sixth Circuit, which has expressly limited gender nonconformity protected from discrimination under Title IX to that which is observable at work. See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006).

177. *Macy*, 2012 WL 1435995, at \*7 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989)) (internal quotation marks omitted).

178. Perkins, *supra* note 67, at 440–41.

179. *Veretto v. Donahoe*, No. 0120110873, 2011 WL 2663401, at \*1 (E.E.O.C. July 1, 2011).

180. *Id.* at \*3.

was motivated by his attitudes about stereotypical gender roles in relationships.”<sup>181</sup>

The EEOC position may eventually influence the courts to view sexual orientation discrimination as a form of sex discrimination. Meanwhile, however, it should also be cited in support of LGBT plaintiffs’ reasonable belief in the interconnected nature of discrimination targeting sex, gender, and sexual orientation for purposes of sustaining a retaliation claim.

### CONCLUSION

Until Congress enumerates sexual orientation and gender identity as characteristics protected from employment discrimination, LGBT workers who experience status-based discrimination on the job must allege sex discrimination in order to gain relief under federal law. This approach is inherently limited by courts’ insistence that sex discrimination should not subsume all discrimination on the basis of sexual orientation or gender identity. As advocates continue to push back against this restrictive approach, they should also make vigorous arguments in support of employees’ attendant retaliation claims. Though courts do not always apply it faithfully, the reasonable belief doctrine ensures that retaliation plaintiffs’ success does not turn on whether they were technically correct that the predicate discrimination was unlawful. Given, then, that retaliation plaintiffs are allowed to be reasonably mistaken, mistakes about the legal status of discrimination against LGBT employees are good candidates for the label “reasonable.” Aside from reasonably believing that sexual orientation and transgender status are protected in their own right, the interrelatedness of sex, gender, and sexual orientation support a reasonable belief that the challenged discrimination is sufficiently gender-related to warrant protection. Because there are so many arguments in support of a reasonable mistake about the legal status of anti-LGBT discrimination, these cases make an excellent vehicle to remind courts of the proper application of reasonable belief doctrine. When these arguments succeed, the retaliation doctrine will afford LGBT plaintiffs the protection they need to more aggressively report discrimination when it occurs. These reports, in turn, will help generate the case law necessary to push back on the limited definition of sex discrimination and support the political efforts to pass statutory protections for sexual orientation and gender identity discrimination.

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181. *Castello v. Donahoe*, No. 0120111795, 2011 WL 6960810, at \*2 (E.E.O.C. Dec. 20, 2011).

